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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

VS.

TERRY RUSSELL HUNT,
MARY ALICE HUNT,
RUSSELL MELVIN HUNT,
DEREK JON HUNT,

Defendants.

Case No: 2:16-CR-00207-RMP

United States' Motion in Limine Re:
Witness Exclusion/Designation of Case
Agent; Self-Serving Hearsay; Reference
to Penalty; Impermissible Character
Evidence and Good Acts

With Oral Argument
September 6, 2017 at 10:00 am

Plaintiff, United States of America, by and through Joseph H. Harrington,

Acting United States Attorney, for the Eastern District of Washington, and George

J.C. Jacobs, III, and Earl A. Hicks, Assistant United States Attorneys for the Eastern

District of Washington, respectfully submits the following motion *in limine*:

Witness Exclusion & Case Agent Designation

The United States requests that this Court issue an order directing that all

witnesses who will testify in the trial scheduled to commence on September 18, 2017

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1 be excluded from the courtroom so that they cannot be influenced by the testimony of
2 other witnesses. *See United States v. Eli*, 718 F.2d 291, 293 (9th Cir. 1983).

3 However, the United States seeks to exclude ATF Special Agent Ryan Young and
4 ATF Forensic Auditor Guy K. Hummel, Jr. from this sequestration order and requests
5 that they be able to sit at counsel table as they are essential to our case.

7 The United States hereby designates Special Agent Young, who may testify as a
8 fact witness, as its representative pursuant to Fed. R. Evid. 615(b), and respectfully
9 requests that the Court permits Special Agent Young to sit at counsel table throughout
10 the trial. In addition, Forensic Auditor Hummel will testify as a summary witness and
11 should also be excluded from the sequestration order pursuant to Fed. R. Evid. 615(b)
12 and (c). Moreover, Rule 615(b) does not preclude the government's designation of
13 two individuals to represent the government at counsel table. *See Breneman v.*
14 *Kennecott Corp.*, 799 F.2d 470, 474 (9th Cir. 1986).

18 **Self-Serving Hearsay:**

19 The United States moves *in limine* to exclude the Defendant's use of self-
20 serving hearsay. An admission or statement by a party is admissible and is exempted
21 from hearsay when offered *against* that party. *See Fed. R. Evid. 801(d)(2)(A); United*
22 *States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004). Moreover, the "Rule of
23 Completeness" does not allow for the defendant to offer his own self-serving hearsay.
24 *See Fed. R. Evid. 106; see also, United States v. Collicott*, 92 F.3d 973, 983 (9th Cir.
25 1996). While the Rules provide exceptions to the general prohibition against hearsay,
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1 "[t]he rules do not, however, provide exceptions for self-serving, exculpatory
2 statements made by a party which are being sought for admission by that same party."

3 *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996). "Indeed, if such
4 statement were deemed admissible ... parties could effectuate an end-run around the
5 adversarial process by, in effect, testifying without swearing an oath, facing cross-
6 examination, or being subjected to first-hand scrutiny by the jury." *Id.* citing *United*
7 *States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000). Therefore, the Defendant cannot
8 offer his/her own exculpatory hearsay statements. If the Defendant wishes to make
9 statements before the jury, he/she can testify. To allow otherwise permits the
10 Defendant to introduce hearsay evidence without taking the oath and without facing
11 cross-examination.

15 **Motion to preclude reference to penalty:**

16 The United States moves *in limine* for the Court to rule that the Defendant shall
17 not be allowed to refer to the potential penalty in this case. This motion is based on
18 common principles of relevance and prejudice. *Fed. R. Evid. 401, 402, 403.*

21 The issue is truly one of avoiding undue prejudice. The fact-finder should be
22 influenced by a compelling issue of fact, and not based instead on hesitation to convict
23 in the face of the potentially serious (or any such) penalty that the Court may impose
24 following a conviction.

26 The United States embraces the language of the Ninth Circuit Model Jury
27 Instructions at Section (7.4) as providing the only competent statement to the jury
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1 regarding how they may consider punishment, to wit: “*The punishment provided by*
2 *law for the crime is for the court to decide. You may not consider punishment in*
3 *deciding whether the government has proved its case against the defendant beyond*
4 *a reasonable doubt.*” *Model Jury Instruction - Ninth Circuit- 2010, Section 7.4.*

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6 **Motion to Exclude Impermissible Character Evidence and “Good Acts”**

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8 The Government anticipates that one of Defendants will seek to place his/her
9 character in issue at trial. The Government also anticipates that defense character
10 witnesses may attempt to testify using specific instances of a Defendant’s good
11 character, in violation of Fed.R.Evid. 405(a).

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13 The Supreme Court has long recognized that character evidence has weak
14 probative value and great potential to confuse the issues and prejudice the jury.

15 *Michaelson v. United States*, 335 U.S. 469, 480, 486 (1948). The Court has thus
16 given trial courts wide discretion to limit the presentation of character evidence. *Id.* at
17 486. Specifically, the Government requests the Court to (1) exclude references to
18 character traits irrelevant to the crime charged: and (2) exclude testimony about
19 specific instances of conduct offered by defense character witnesses to show a
20 character trait.

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24 **a. Defendant cannot introduce evidence of a character trait irrelevant
25 to the crime charged**

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27 The character evidence that Defendants offer must be pertinent to the crime
28 charged. *Fed.R.Evid. 404(a).* Courts of appeal have consistently upheld decisions by

1 the district courts excluding evidence of irrelevant character traits offered by a
2 defendant. *See United States v. Santana-Camacho*, 931 F.2d 966, 967-68 (1st Cir.
3 1991) (testimony of defendant's daughter purportedly showing that defendant was a
4 good family man was inadmissible character evidence inasmuch as such character
5 traits were not pertinent to charged crime of illegally bringing aliens into the United
6 States); *United States v. Nazzaro*, 889 F.2d 1158, 1168 (1st Cir. 1989) (evidence of
7 receipt by defendant, a police officer, of a medal of valor and various commendations
8 was properly excluded in mail fraud case since traits which such awards and
9 commendations tended to show – bravery, attention to duty, and community spirit –
10 were not pertinent to the charged offenses); *United States v. Hedgcorth*, 873 F.2d
11 1307, 1313 (9th Cir.), *cert. denied*, 493 U.S. 857 (1989) (excluding evidence regarding
12 defendant's character for truthfulness in prosecution for violations of federal
13 explosives and firearms laws); *United States v. Goldfarb*, 643 F.2d 422, 434 (6th Cir.),
14 *cert. denied*, 454 U.S. 827 (1981) (attempt by defense to introduce, in a Travel Act
15 prosecution, evidence of defendant's gallantry as a pilot during two tours in Vietnam
16 was properly excluded).

17 In this case, evidence of traits which defendants may claim to possess – such as
18 generosity, dedication to family, civic activities, and similar traits and attributes
19 having no bearing on the charged offenses – should be excluded. These traits are not
20 pertinent to the crimes charged, and there is no exception to the Federal Rules of
21 Evidence permitting such evidence.

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1 Rule 404(a)(1) requires that the Court limit the Defendants' character evidence
2 to three pertinent traits: law-abiding nature; honesty; and truthfulness, and precludes
3 the Defendants from presenting any testimony regarding overall general good
4 character. The general trait of being a law-abiding citizen is pertinent in all criminal
5 prosecutions. *See United States v. Hewitt*, 634 F.2d 277, 279 (5th Cir. 1981) (Unit A)
6 (holding that under Federal Rules 404 and 405(a), lawfulness is pertinent trait of
7 character in all criminal prosecutions); *see also In re Sealed Case*, 352 F.3d 409, 412
8 (D.C. Cir. 2003) ("Courts have held that the general character trait of law-abidingness
9 is pertinent to almost all criminal offense."); *United States v. Angelini*, 678 F.2d 380,
10 381 (1st Cir. 1982) (finding that district court erred when it excluded character
11 evidence that defendant was a law abiding citizen). The traits for truthfulness or
12 honesty are relevant "when the defendant is charged with an offense in which fraud or
13 falsehood is one of its statutory elements." *In re Sealed Case*, 352 F.3d at 412; *see*
14 *also Hewitt*, 634 F.2d at 279 (stating that the trait of truthfulness is pertinent when an
15 element of the offense charged is a lie by the defendant). The Government recognizes
16 that by charging Defendants with offenses that involve allegations of falsehood, the
17 Defendants' honesty and truthfulness are pertinent traits. Thus, pursuant to Rule
18 404(a)(1), the Defendants may present character evidence regarding the traits of being
19 a law-abiding, truthful, and honest.

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26 **b. Defendants may not introduce specific acts of conduct to show a**
27 **character trait**

1 Evidence of specific acts may not be used to prove character where the
2 evidence is to be used circumstantially to support the inference that a person acted in
3 conformity with his character. Jack B. Weinstein & Margaret A. Berger, 2
4 *Weinstein's Federal Evidence* § 405.05[3] (2d ed. 2007). *See also* Fed.R.Evid.
5 404(b), 405(b), and 403. This exclusionary rule, of course, applies to specific
6 instances of *good* conduct as well as those that are bad. *See United States v. Camejo*,
7 929 F.2d 610, 613 (11th Cir. 1991) (excluding evidence of prior good conduct offered
8 to negate criminal intent), cert. denied, 502 U.S. 880 (1992); *United States v. Barry*,
9 814 F.2d 1400, 1403 (9th Cir. 1987) ("[T]estimony as to the lack of prior bad acts is, in
10 essence, testimony as to the multiple instances of good conduct, and its admission
11 would appear to violate a strict reading of Rule 405(a)."); *United States v. Hill*, 40
12 F.3d 164, 168 (7th Cir. 1994) (affirming district court's exclusion of evidence that
13 "was nothing more than classic character evidence offered to prove that [the
14 defendant] had a good character and acted in conformity therewith").

15 Although the defense may not introduce specific acts to show a character trait,
16 the Government is permitted to inquire into relevant specific instances of conduct on
17 cross-examination of character witnesses. Fed.R.Evid. 405(a); *United States v. Adair*,
18 951 F.2d 316, 319 (11th Cir. 1992) (defense character witnesses may be cross-
19 examined as to whether they have heard of particular instances of conduct relevant to
20 a trait in question); *United States v. Manos*, 848 F.2d 1427, 1430 (7th Cir. 1988)
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1 (opinion and reputation testimony are subject to cross-examination regarding specific
2 instances of conduct).

3 **CONCLUSION**

4
5 Therefore, the United States respectfully requests that this Court grant the
6 foregoing motions *in limine* based on the authority and considerations noted above.

7 Dated: August 15, 2017.

8
9 JOSEPH H. HARRINGTON
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12 George J.C. Jacobs, III
13 Assistant United States Attorney

14 s/ **Earl A. Hicks**
15 Earl A. Hicks
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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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